Supreme Court
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No. 90-177

In The

Supreme Court of the United States

October Term, 1990

BETTY P. DOUTHWAITE,

Petitioner,

v.

STATE OF VIRGINIA,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the decision of the court of appeals affirming the district court's order that the Eleventh Amendment bars suit against the Commonwealth of Virginia, and that the Commonwealth is not a person within the meaning of 42 U.S.C. § 1983, is worthy of review.

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STATEMENT OF THE CASE

Petitioner seeks this Court's review of an order of the United States Court of Appeals for the Fourth Circuit, affirming the action of the United States District Court for the Eastern District of Virginia dismissing petitioner's complaint for lack of jurisdiction.

The district court action was filed by petitioner, Betty P. Douthwaite, on May 2, 1989, against Respondent alleging that on May 4, 1982, she was involuntarily committed to the Northern Virginia Mental Health Institute, a state facility located in Falls Church, Virginia. The commitment warrant was allegedly signed or issued by a Fairfax County Police Officer. The complaint further alleged that petitioner was hospitalized and drugged against her will for approximately six weeks. The complaint did not name a state "actor" or official.

The cause of action described this commitment as a tortious act, citing violations of the Fourth and Fourteenth Amendments to the United States Constitution, as well as § 37.1-67.3, Code of Virginia. She also referenced the Supremacy Clause of the Constitution and the federal Tort Claims Act.

The district court judge concluded that petitioner's action against the State of Virginia was barred by the Eleventh Amendment of the United States Constitution and that the State of Virginia was not a person within the meaning of 42 U.S.C. § 1983. The Court, therefore, dismissed her action. The Court of Appeals thereafter affirmed, *Douthwaite v. State of Virginia*, No. 89-2755 (4th Cir. May 1, 1990) (unpub.) holding that the appeal was without merit. The court of appeals also pointed out that

a dismissal on the grounds of lack of jurisdiction is a dismissal without prejudice, so the action could be reinstituted against the proper parties.

SUMMARY OF ARGUMENT

Petitioner does not raise any significant issue which has not already been addressed by this Court. The lower courts correctly decided the constitutional issues in applying the Eleventh Amendment immunity bar as articulated in *Alabama v. Pugh*, 438 U.S. 781 (1978) and correctly held that Respondent is not a person within the meaning of 42 U.S.C. § 1983.

ARGUMENT: REASONS FOR DENYING THE WRIT

1. Petitioner's Eleventh Amendment challenge has been previously considered and rejected by this Court

The judicial power of the United States is restricted by the Eleventh Amendment to the Constitution of the United States, which bars federal court suits against states as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

As held in *Alabama v. Pugh*, 438 U.S. 781, 782 (1978), the Eleventh Amendment bars suit against a state and its agencies, unless the state has consented to the filing of

such a suit. This Court has reaffirmed this rule in numerous cases. *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Virginia has not consented to be sued in federal court. The common law doctrine of sovereign immunity remains in place in Virginia, subject to the limited waiver established by the Virginia Tort Claims Act, § 8.01-195.1-195.9 of the Code of Virginia ("the Act"). Under the Act, claimants may sue the Commonwealth in state court for negligent acts or omissions, subject to certain notice requirements.

The Act, however, may not be construed as a waiver of immunity under the Eleventh Amendment to the same or similar suits in federal court. *Reynolds v. Sheriff, City of Richmond*, 574 F. Supp. 90 (E.D. Va. 1983). This principle also was affirmed in *Pennhurst, supra*, 465 U.S. 89, a case in which this Court articulated the rationale that a state's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued as well. The *Pennhurst* Court also reaffirmed the principle first enunciated in *Hans v. Louisiana*, 134 U.S. 1 (1890) that an unconsenting state is immune from suits brought in federal court by her own citizens, as well as by citizens of another state.

There is nothing unique or different about the case at bar which suggests that this issue should be relitigated.

2. The decision by the court of appeals is consistent with prior decisions of this Court

Petitioner argues that the court's decision below is not consistent with the Constitution of the United States. This contention has no merit.

The court of appeal's decision is in accord with the Eleventh Amendment to the United States Constitution and with this Court's recognition that the Eleventh Amendment bars suit against a state unless the state expressly consents to such suit. *Alabama v. Pugh*, 438 U.S. 781 (1978). Both lower courts herein applied the correct legal standards to the facts presented and dismissed the suit against the State of Virginia.

3. Respondent is not a "person" within the meaning of 42 U.S.C. § 1983 as this court has previously held

Petitioner argues that the State of Virginia should be a "person" under 42 U.S.C. § 1983. It is well settled, however, that a state is not a "person" subject to liability under 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Lawson v. Rockingham County*, 359 F. Supp. 171, 172 (W.D. Va. 1973); *Taliaferro v. State Council of Higher Education*, 372 F. Supp. 1378, 1381 (E.D. Va. 1974); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963). States "are not within the ambit of § 1983, which makes persons liable for deprivation of rights, privileges or immunities secured by the Constitution and laws." *Lawson*, 359 F. Supp. at 172. Since the Commonwealth of Virginia is not a "person" under the Civil Rights Act and therefore not amenable to suit under § 1983, the lower courts properly ruled that there was no

jurisdiction to entertain plaintiff's claim. *Black Brothers Combined v. City of Richmond*, 386 F. Supp. 147, 149 (E.D. Va. 1974); 28 U.S.C. § 1343.

CONCLUSION

This petition raises no novel question of constitutional significance. The issue presented has been decided and confirmed many times by this Court. The lower courts herein applied the correct legal standards to facts supported by the record.

The Commonwealth of Virginia is protected from suit under the grant of immunity of the Eleventh Amendment to the United States Constitution. Also, the Commonwealth of Virginia does not constitute a "person" within the meaning of 42 U.S.C. § 1983. Accordingly, Respondent asks that the petition be denied.

Respectfully submitted,

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